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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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INDEX

Cases:

	Page
FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621	9
FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1	9
Florida Gas Transmission Company, 47 F.P.C. 341	7
Gulf States Utilities Co. v. *FPC*, 411 U.S. 747	8
Home Gas Company, 13 F.P.C. 241	7
Houston East & West Texas Ry. Co. v. *United States* (*Shreveport* Case), 234 U.S. 342	3, 4
Jaspan v. *Philadelphia Electric Co.*, 1 F.P.C. 561	5–6
Louisville Gas & Electric Co. v. *FPC*, 129 F. 2d. 126, certiorari denied, 318 U.S. 761	8
Otter Tail Power Co. v. *United States*, 410 U.S. 366	5, 9
Otter Tail Power Co., 2 F.P.C., 134	6
Pacific Gas & Electric Company, 13 F.P.C. 200	7
Panhandle Eastern Pipe Line Co. v. *FPC*, 324 U.S. 635	6, 7
Wisconsin-Michigan Power Company, 31 F.P.C. 1445	7

Statutes:

Federal Water Power Act (Act of June 10, 1920), 41 Stat. 1063, 16 U.S.C. 791–823, as subsequently amended (46 Stat. 797) including amendments and additions and change of name by Title II of the Public Utility Act of 1935 (Act of August 26, 1935), 49 Stat. 838, 16 U.S.C. 791a–825r:	
Section 19, 16 U.S.C. 812	7–8
Section 20, 16 U.S.C. 813	7–8
Section 201(b), 16 U.S.C. 824(b)	4, 5
Section 205(b), 16 U.S.C. 824d(b)	3–4, 5, 8
Section 206(b), 16 U.S.C. 824e(a)	3–4, 5
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:	
Section 1(a)(a), 49 U.S.C. 1(2)(a)	4, 5
Section 3(1), 49 U.S.C. 3(1)	4

204-840 - 76 — 1

Statutes—Continued Page
Natural Gas Act, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:
Section 1(b), 15 U.S.C. 717(b) ---- 6
Section 4(b), 15 U.S.C. 717c(b) ---- 6
Section 5(a), 15 U.S.C. 717d(a) ---- 6
Miscellaneous:
Hearings on 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (March 12, 1935) ---- 5

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1. In the preliminary portions of its brief Conway Corporation, *et al.*[1] claims repeatedly that the Federal Power Commission ("Commission" or "FPC") seems intent on inflating wholesale rates (see Conway Br., pp. 14, 16, 17). While the Commission disputes these claims, a detailed refutation would be pointless because they are irrelevant to the issue in this case: Whether the Commission has statutory authority to reduce a public utility's otherwise just and reasonable

[1] Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc., Arkansas (collectively referred to as "Conway").

wholesale rates because a utility allegedly maintains depressed, anticompetitive retail rates (Pet. App. 22a–23a).

2. Failure now to acknowledge that this is the central issue presented allows Conway to argue that the Commission erred in "persist[ing] * * * in here asserting" that "the fault lies with a 'voluntarily depressed retail rate'" (Conway Br., pp. 13, 41–42). Conway claims that the fault lies with "the higher, offending, jurisdictional [wholesale] rate" (Br., p. 38).[2]

But the alleged impact of voluntarily depressed retail rates is at the core of the present controversy, as the court of appeals recognized.[3] Thus the court characterized the matter as "the utility's own decision to *depress certain retail revenues* in order to curb the retail competition of its wholesale customers" (Pet. App. 22a–23a; emphasis supplied). Indeed, in its petition for rehearing before the Commission (J.A. 56; emphasis added) Conway characterized the wholesale rate as "substantially more than is charged retail customers with similar characteristics whose rates the company has *voluntarily refused even to seek to increase* * * *."

[2] Similarly, the American Public Power Association ("APPA") suggests that the issue of depressed retail rates is the *Commission's* "postulate" (Br., p. 5), "hypothetical" (Br., p. 21), "fanciful hypothesis" (Br., p. 21), or "odd assumption of masochism in setting low retail rates" (Br., p. 22). "APPA" refers to *amicus*, American Public Power Association and "Cities" refers to *amici*, Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles and Rochelle, Illinois.

[3] Cities, for their part, also recognize this as the underlying issue (see, *e.g.* Br., pp. 5–8, 28, 32).

As the court of appeals recognized, were the Commission to establish wholesale rates in these proceedings without reference to retail rates, it would establish a just and reasonable rate. If this rate is to be lowered, it is because the retail rate—subject to the jurisdiction of a state commission and not the FPC—has been purposely set at an artificially low and anticompetitive level.

However, this Court has recognized that, even where a federal agency does have the power to remedy a discrimination between jurisdictional wholesale rates and nonjurisdictional retail rates, it may not do so by sacrificing the federally mandated just and reasonable rate. In *Houston, East & West Texas Ry. Co.* v. *United States* (*Shreveport* Case), 234 U.S. 342, the Court considered a discriminatory disparity between just and reasonable, federally regulated interstate rates and voluntarily depressed[4] intrastate rates regulated by the state. The Court stated (234 U.S. at 355):

> It is * * * clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to [otherwise] be a proper standard * * *.

3. Both Conway and Cities make oblique criticisms of the Commission's discussion of the legislative history of Sections 205(b) and 206(a) of the Federal

[4] The depressed intrastate railroad rates in *Shreveport* although established by the Railroad Commission of Texas, were accepted and fully acquiesced in by the railroad "without more, at most than a perfunctory protest" (see 205 Fed. 380, 386, 391).

Power Act, 16 U.S.C. 824d(b) and 824e(a) (see *e.g.*, Conway Br., pp. 32–33, 35; Cities Br., pp. 4, 6, 9–11). However, neither Conway nor Cities offers as much as a single word of legislative history that is in any way contrary to that adduced by the Commission.

The Commission's opening brief (pp. 13–21) demonstrated that the Interstate Commerce Commission's (ICC) broad power to remove discriminations caused by nonjurisdictional rates under Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), as interpreted by this Court in the *Shreveport* case, *supra,* was specifically excluded from the scope of Sections 205(b) and 206(a) of the Federal Power Act. Nevertheless, Conway and Cities claim that the language of Sections 205(b) and 206(a) is "very similar" (Conway Br., p. 32), "indistinguishable" or "substantively identical" (Cities Br., pp. 9, 11) to Section 3(1) of the Interstate Commerce Act.

Cities claim (Br., pp. 10–11) that by focusing on the general jurisdictional provisions of the Federal Power Act and Interstate Commerce Act, 16 U.S.C. 824(b) and 49 U.S.C. 1(2)(a), respectively, one may compare the authority of the FPC and ICC to remedy discrimination. On the contrary, the proper focus is on the antidiscrimination provisions of the two acts. Sections 205(b) and 206(a) of the Federal Power Act differ markedly from Section 3(1) of the Interstate Commerce Act. As the Court explained in *Shreveport,* supra, 234 U.S. at 356–359, the latter provision gives the ICC broad authority with respect to discriminatory nonjurisdictional rates, authority which the ICC *would not otherwise possess* under its general jurisdictional statute, 49 U.S.C. 1(2)(a). In contrast, the FPC's authority to remedy discriminatory rates under Sections 205(b) and 206(a) of the Federal Power Act is expressly limited to rates for *"any transmission or sale subject to the jurisdiction of the Commission" ibid.*; emphasis supplied), that is, *"the sale of electric energy at wholesale"* (Section 201(b), 16 U.S.C. 824(b); emphasis supplied).

Finally Conway attempts to circumvent the unequivocal statement in the legislative record that the Commission is to evaluate a jurisdictional wholesale rate based "upon its reasonableness, *its reasonableness without regard to what the intrastate rate is*"[5] by suggesting (Br., p. 35) that the deletion of a provision giving the Commission authority to order transmission[6] somehow changed Congress' intent with respect to the limits of Commission authority under Sections 205(b) and 206(a). Conway's suggestion is a *non sequitur.*

4. The opposing parties also claim that the Commission's present interpretation of the meaning of Sections 205(b) and 206(a) of the Federal Power Act is inconsistent with Commission precedent. However, they have ignored the fact that the Commission's view was announced nearly forty years ago in *Jaspan* v. *Philadelphia Electric Co.,* 1 F.P.C. 561, 565:

> The Federal Power Commission * * * has no power or authority to remove unjust discrimi-

[5] Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 503 (March 12, 1935; emphasis supplied).

[6] See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 375.

> nation which may be the result of rates charged * * * to * * * intrastate [retail] consumers.

Furthermore, the opposing parties' discussion of *Otter Tail Power Co.*, 2 F.P.C. 134, begs the underlying question,[7] because *Otter Tail* involved discrimination between *wholesale* customers.[8]

Conway (Br., pp. 38–39) and Cities (Br., pp. 25–27) also place great emphasis on *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635. The reasons why *Panhandle* does not advance respondent's case were explained in our opening brief (pp. 24–27). However, we note that Conway here claims (Br., p. 39) that the Commission, in its *Panhandle* brief "expressly told this Court that the discrimination clause in the Natural Gas Act applied to direct industrial sales." Conway has been too selective in its reading of that brief. What the Commission said was that, under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), it had *transportation* jurisdiction over direct industrial sales, and that the antidiscrimination provisions of Sections 4(b) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(b) and 717d(a), specifically apply to such

[7] See Conway Br., pp. 23–26, APPA Br., pp. 13–15, Cities Br., pp. 29–30.

[8] Nor is Cities' quote (at Br., p. 29) from *Otter Tail*, 2 F.P.C. at 146, relevant. This is because evidence of APLC's retail rates was not offered for the purpose of showing the intrinsic reasonableness of those rates (see the Commission's opening brief at p. 24, n. 22). Likewise, APPA errs (at Br., p. 20, n. 12) when it fails to recognize that evidence of APLC's retail rates, even if they could be relevant in assessing APLC's risk as an investment, the evidence was not offered for that purpose.

transportation.[9] The Commission's view of its jurisdiction in this case is entirely consistent with *Panhandle*.[10]

5. Conway's discussion (Br., pp. 40–41 and 43, n. 35) of the antidiscrimination provisions of Part I of the Federal Power Act, specifically Sections 19 and 20 thereof, 16 U.S.C. 812 and 813, is incorrect.

[9] In its *Panhandle* brief the Commission said (Br., p. 23):

"Petitioners' contentions that their interstate direct industrial business was to be entirely free of regulation is not persuasive (Br. 19–21). [Footnote omitted.] They overlook the fact that Section 1(b) makes the provisions of the Act applicable 'to the transportation of natural gas in interstate commerce,' and incorrectly state (Br. 19) that the section makes the provisions of the Act applicable only to the transportation and sale in interstate commerce of natural gas for resale."

[10] Contrary to what the opposing parties imply (Conway Br., p. 36, n. 27; Cities Br., p. 25, n. 32), in *Pacific Gas & Electric Company*, 13 F.P.C. 200, 209, the Commission did not establish jurisdictional rates on the basis of rates which it considered nonjurisdictional. Similarly, Conway misapprehends *Home Gas Company*, 13 F.P.C. 241, 267, where the Commission found that certain rates improperly allocated costs as between wholesale and retail customers and discriminated against the wholesale class.

Finally, Conway misreads both *Wisconsin-Michigan Power Company*, 31 F.P.C. 1445, 1451, and *Florida Gas Transmission Company*, 47 F.P.C. 341. In *Wisconsin-Michigan* the subject rate was clearly jurisdictional and a specious claim to the contrary was emphatically rejected. In *Florida Gas* the pipeline company *voluntarily* offered interruptible service at less than cost because an interruptible rate based on fully allocated costs would not have been competitive with alternative fuels. No firm customers objected because their fixed cost burden was reduced because of the interruptible sales. Nevertheless, finding that more fixed costs could be allocated to the interruptible rate while maintaining its competitiveness, it was that adjustment alone which the Commission was "prescribing" (Conway Br., p. 39, n. 29) in *Florida Gas*.

Under Part I, which was formerly the Federal Water Power Act of 1920, the Commission has authority to license the development of hydroelectric facilities, but it is not given any ratemaking authority. The one exception is where a licensee's retail rates, otherwise subject to state regulation, are not so regulated.[11] In this case, although APLC is a licensee under Part I of the Act,[12] its rates are subject to the full scope of state regulatory authority.

6. The opposing parties also argue, citing *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, that if the Commission does not remedy the discrimination alleged here, there will be a "gap" in regulation (see *e.g.*, Cities Br., pp. 28, 30–31).[13] The parties misapprehend *Gulf States*. In that case the Court said that "in *appropriate circumstances*" the Commission is to consider "the anticompetitive effects of *regulated aspects* of interstate utility operations," 411 U.S. at 758–759; emphasis supplied. However, here it is the retail rates, which are not regulated by the FPC, that cause the alleged discrimination.[14]

[11] See *Louisville Gas & Electric Co.* v. *FPC*, 129 F. 2d 126, 132 (C.C.A. 6), certiorari denied, 318 U.S. 761.

[12] APLC operates two small hydroelectric projects, licensed in 1923. They produce less than 2 percent of APLC's total system generation (1975 APLC Annual Report, FPC Form No. 1, p. 431).

[13] See also, Conway Br., pp. 5, 29–31; Cities Br., pp. 3, 4, 16–18, 22, 23–25; APPA Br., pp. 5, 11–12, 24–26.

[14] Ignoring the Commission's opening brief at p. 29, n. 26, Conway continues to assert (Br., pp. 5, 30–31), as does APPA (Br., pp. 11, 26), that in the Commission's *Gulf States* brief to this Court, it took the position that Section 205(b) gives the Commission authority to remedy the price squeeze. The Commission said nothing of the kind.

Moreover, the want of jurisdiction on the part of the Commission to remedy this discrimination does not create a "gap" in regulation. Aspects of a utility's relationship with its wholesale customers—if violative of the antitrust laws—which are not subject to agency regulation are subject to judicial sanction. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366.[15]

Finally, there is no reason why recourse under the antitrust laws should "as a matter of comity * * * be a last resort rather than a remedy repaired to whenever a filing instituting a 'price squeeze' is made" (see Conway Br., pp. 42–43). Under the opinion of the court of appeals, the Commission would be empowered to reduce wholesale rates to "the lower range of the zone of reasonableness" (Pet. App. 22a). Such relief is narrow and ephemeral. As a consequence, the "constant and otherwise unnecessary" litigation of which Conway speaks (Br., p. 9) would nevertheless

[15] Nor do *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, or *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 support a different conclusion (see Conway Br., pp. 35–38, Cities Br., pp. 17–18, APPA Br., pp. 24–25). The conduct challenged in each of those cases, although inconsistent with certain aspects of the public interest, was otherwise lawful, and in the absence of FPC jurisdiction would not have been subject to government regulation of any kind. That is not the case here, where the alleged conduct is in violation of the antitrust laws and subject to full judicial scrutiny.

Moreover, the Commission's power to assure that curtailment of natural gas deliveries does not unduly discriminate between wholesale and retail customers arises from its jurisdiction to regulate all *transportation* of natural gas in interstate commerce whether the gas so transported is ultimately sold at wholesale or retail. *Louisiana Power & Light Co.*, *supra*, 406 U.S. at 636. *Ratemaking* jurisdiction under both the Natural Gas Act and the Federal Power Act is limited to sales for resale.

be necessary despite FPC jurisdiction over the discrimination alleged here.

Respectfully submitted.

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I authorize the filing of the above brief.

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